Supreme Court, U.S.
FILED
APR 29 1991
OFFICE OF THE CLERK

No. 90-1663

IN THE

Supreme Court of the United States

October Term, 1990

WILLIAM R. SACHS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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(6230—LC3-383)

QUESTION PRESENTED.

Where defendant's motion to vacate the judgment of conviction, pursuant to New York State Criminal Procedure Law 440.10, is based on the wrongdoings of the trial judge, is there violation of defendant's rights to a fair trial under the Fourteenth Amendment of the United States Constitution where the same trial judge presides at the latter motion to review his own alleged prior wrongdoings at the trial?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1990 Term

- X

WILLIAM R. SACHS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

- X

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
STATE OF NEW YORK.

Petitioner, William R. Sachs, respectfully prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York, which refuses to review the order denying defendant's motion to vacate

judgment of dismissal pursuant to CPL 440.10, based on wrongdoings of the trial judge, wherein said trial judge presided at the motion to review his own alleged prior wrongdoings.

ORDERS BELOW.

The unpublished order of the Supreme Court of the State of New York appears in Appendix A to this petition. The unpublished Appellate Division certificate appears in Appendix B to this petition. The unpublished Court of Appeals certificate dismissing application appears in Appendix C to this petition.

JURISDICTION.

The Court of Appeals' order in this matter was filed on February 1, 1991 and is set forth in Appendix C. This

Court's jurisdiction is invoked under Title 28, U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendment XIV of the United States Constitution is set forth in Appendix D.

STATEMENT OF THE CASE.

Judgment of the Supreme Court, New York County (Richard Andrias, J. at trial with a jury), rendered on or about July 19, 1988, convicted defendant of bribe receiving in the third degree and defendant was sentenced to a definite term of imprisonment of six (6) months and a fine of $2,000.00. The Appellate Division of the Supreme Court, First Department, unanimously affirmed the Supreme Court judgment by order dated June 5, 1990.

On April 19, 1990, defendant filed a *pro se* application pursuant to CPLR 440.10 to vacate the judgment on the grounds that (a) the judgment was procured by duress, misrepresentation or fraud on the part of the Court or prosecutor, (b) material evidence produced at the trial resulting in judgment was false and was prior to the entry of the judgment, known by the prosecutor and by the court to be false, (c) improper and prejudicial conduct not appearing on the record occurred during the trial resulting in the judgment, which conduct, if it had appeared on the record, would have required a reversal of the judgment upon an appeal therefrom, and (d) the judgment was obtained in violation of the defendant's rights under the Constitutions of the United States and the State of New York.

In his CPL 440.10 application, defendant sets forth that at the trial Robert Lamarata, the undercover agent, the prosecutor's chief witness, falsely testified that he met Barry Gold, the informer, at the very same meeting in the restaurant when he met the defendant. The defendant sets forth that this is untrue and that Mr. Lamarata had personally met with Barry Gold on previous occasions and that the false testimony was important and material in his conviction.

The defendant further sets forth in his CPL 440.10 application that the said perjurious testimony of the prosecutor's chief witness was omitted or deleted from the trial transcript. And, in addition, the trial transcript does not record the improper conference conducted by the trial judge with the

prosecutor and Mr. Lamarata that took place immediately following the false testimony. Lastly, the trial transcript does not properly record that Mr. Lamarata did not conclude his testimony, that after the recess he failed to return to the stand to be requestioned by defendant's attorney.

Defendant's attorney, Richard P. Broder, who represented defendant on the appeal to the Appellate Division was not present at the trial and did not have personal knowledge of the improprieties that had taken place at the trial and he did not include said points in the appeal filed on behalf of the defendant. Prosecutional misconduct may be pursued under CPL 440.10, *People v. Mitchell* (App. Div., 1st Dept, 1980, 78 A.D.2d 820, 433 N.Y.S. 2d 126).

Defendant's *pro se* application to vacate the judgment pursuant to CPLR 440.10 was supported by the sworn affidavits of defendant, himself, and also of his wife, Margaret Gene Sachs, and his brother, Robert A. Sachs, all sworn to under penalties of perjury dated April 18, 1990. A hearing was required pursuant to CPL 440.30(5).

Defendant's CPL 440.10 application was scheduled for argument on May 12, 1990 before the trial judge, Hon. Richard Andrias. The prosecutor did not submit opposing papers to defendant's application.

Defendant's application was denied from the bench on May 2, 1990. Justice Andrias affixed a "SO ORDERED" to the transcript dated June 27, 1990.

Defendant made motion to the Appellate Division, First Department for

certificate granting leave to appeal from the denial of the motion, which was denied by E. Leo Milonas, Justice of the Appellate Division, First Department, by order dated July 19, 1990. Thereafter, defendant made application to the Court of Appeals, dated December 7, 1990, for a certificate of appeal to the Court of Appeals which was dismissed by Vito J. Titone, Associate Judge of the Court of Appeals of the State of New York, by order dated February 1, 1991.

REASONS FOR GRANTING THE WRIT.

Certiorari should be granted so that this Court could clarify the rights of the defendant in an application pursuant to CPL 440.10, under the Constitution of the United States, Fourteenth Amendment:

"the motion to vacate judgment was intended to embrace, *inter alia*, the writ of *coram nobis* which was used under prior law to challenge the validity of a judgment of conviction. The procedural counterpart of the ancient writ of *coram nobis* are Sections 440.10 and 440.30 of the Criminal Procedure Law." 35 N.Y. Jur 2d 321, Criminal Law, Section 2968.

"There is some difference of opinion among the courts as to whether the judge who rendered the judgment complained of in a petition for writ of error *coram nobis* should also pass upon the allowance of such writ. In some cases the view is taken that however possible, the judge who tried the original action should pass upon the allowance of the writ, since a refusal may in part be based upon his knowledge of the facts that occurred at the trial. In other cases, however, the view is taken that the hearing on a petition for writ of *coram nobis* should be held before a judge other than the sentencing judge, since the latter may appear and testify as a witness, and that where the sentencing judge may be a material witness in the *coram nobis* proceedings he should not hear the case but ought to disquality himself." 18 Am Jur 2d 653, *Coram Nobis*, Section 29.

In a case such as ours, where the application pursuant to CPL 440.10 is based on the improprieties of the judge himself, the statute should require the trial judge to recuse himself from hearing the motion.

The judge in our case did not recuse himself and stated on the record:

> "THE COURT: I've read the papers. They were the most offensive set of papers that I've ever seen in my entire legal career which, as of last Saturday, is 20 years. They were insulting to me. And I don't take it personally because you're now an advocate as well as a party.
>
> "They were insulting to the lawyers involved. They were total fabrication and fantasy. And the motion is denied." Page 3.

The court became so unjudicious that he blurted out:

> "I don't want to ever

> see another paper from you personally." Page 3.

It must be pointed out that the judge, besides denying the CPL 440.10 motion, he additionally scheduled the date for the defendant to surrender and go to jail, even though the appeal had not been decided at that time and the Appellate Division could very well have reversed the judgment of conviction.

Defendant's schedule to go to jail was not the subject matter of the motion pursuant to CPL 440.10. Justice Andrias nevertheless ordered:

> "Let's do it on the 4th of July. We will give him a send off. We don't meet on the 4th of July. We'll be meeting on the 3rd of July that week." Page 4.

The judge not only failed to grant defendant a hearing to enable him to prove the allegations set forth in the

supporting affidavits attached to the motion papers but he actually denied the defendant the opportunity to speak at what was supposed to be oral argument on May 2, 1990:

> "MR. SACHS: May I speak, your Honor?" Page 3.
>
> "THE COURT: No. I read your papers. That's the whole purpose ***." Page 4.

Nor did the judge set forth the statement of fact and the conclusion of law in support of his decision as required under CPL 440.30(7).

This court has held *In re Murchison*, 349 U.S. 133 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course required an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no

> man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge *** not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'."

So too, the U. S. Court of Appeals, Second Circuit, held in the case of *United States of America v. Patrick Halley*, 240 F.2d 418 (1957):

> "Indeed in many of these proceedings judges have been called as witnesses *** and

> where the judge may be a material witness he himself should not hear the case but ought to disquality himself."

Again, in the case of *United States of America v. John Valentino*, U. S. Court of Appeals, Second Circuit, 283 F.2d 634 (1960):

> "The hearing should be held before a judge who will not be required to testify as a material witness in the proceeding ***."

On the other hand, the Court of Appeals, Second Circuit, states in the case of the *United States of America v. Paul M. Hughes*, 325 F.2d 789 (1964), held that under the circumstances, there was no abuse of discretion where the judge before whom the motion was heard did not disqualify himself. It so happens that in the *Hughes* case, the judge was not called as a witness. In our case, the

judge certainly would have been called as a witness if a hearing had been held as required under CPL 440.30.

In the case of *People v. Joseph Carpus* (152 N.Y.S.2d 27) (1956), the Appellate Division, Fourth Department, held:

> "The record before us does not conclusively refute the allegations of the petition and we think the appellant should have been afforded a hearing *** The hearing should be had before a judge other than the sentencing judge."

Under the Common Law, "The judge was expected to exercise sound discretion by refraining from trying cases where any circumstances might cast doubt or suspicion on the fairness of the court." (46 Am Jur 2d 159).

There is authority that states that under the "Rule of Necessity," a judge is not disqualified to try a case

because of his personal interest in the matter at issue if there is no other judge to hear and decide the case. *Atkins v. U.S.*, Ct. Cl. 1977, 556 F2d 1028, certiorari denied 98 S.Ct. 718, 434 U.S. 1009, 54 L.Ed. 2d 751. In our case, the "Rule of Necessity" does not apply because in the New York Supreme Court there are indeed other judges who could make themselves available to hear the motion.

This Court should grant certiorari here to explicate the rule and resolve the conflict of the cases that where defendant makes motion pursuant to CPL 440.10 on the grounds of improprieties of the trial judge, the motion must be heard by another judge.

CONCLUSION.

For the reasons set forth above, a writ of certiorari should issue to review the orders in the courts below.

Dated: New York, New York
April 22, 1991

Respectfully submitted,

WILLIAM R. SACHS
Petitioner *Pro Se*

APPENDIX A.

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK (J. ANDRIAS) DENYING DEFENDANT'S MOTION FROM BENCH, DATED MAY 2, 1990, - "SO ORDERED" AFFIXED TO TRANSCRIPT JUNE 27, 1990.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK PART 63

----------X

PEOPLE OF THE STATE OF NEW YORK, Ind. No. 04807-87

-vs-

WILLIAM R. SACHS, Calendar Call

Defendant.

----------X

May 2, 1990
100 Centre Street
New York, N.Y.

B E F O R E :

HONORABLE RICHARD ANDRIAS,

J.S.C.

A P P E A R A N C E S :

For the People:
ELLIOT SPITZER, Esq.
Assistant District Attorney
New York County

For the Defendant:
(Pro se.)

JOYCE FISHER
Senior Court Reporter

THE CLERK: Number 7 on the calendar, Indictment Number 4807 of '87, William Sachs.

MR. SPITZER: For the People, Elliot Spitzer.

MR. SACHS: Defendant William R. Sachs, pro se.

THE COURT: What has taken two years to get this case before the Appellate Division, Mr. Sachs? I granted you bail pending appeal on the understanding that there would be a swift appeal and it seems to me that at every trun this case has taken a meandering detour.

What's the situation with your appeal? That's the first question I have of you.

MR. SACHS: The hearing at the Appellate Division was held.

THE COURT: The argument or the hearing on the stay?

MR. SACHS: The argument.

THE COURT: On the case itself?

MR. SACHS: yes.

THE COURT: The merits?

MR. SACHS: Yes.

THE COURT: When?

MR. SACHS: I believe it was April 19.

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THE COURT: Fine.

Now, let's get to this case. That's all I wanted to know. I assume they can write a decision. They have a big staff.

What do you want here?

MR. SACHS: I want the charge dismissed.

THE COURT: Do you want to say anything?

MR. SPITZER: Well, Judge --

THE COURT: I've read the papers. They were the most offensive set of papers that I've ever seen in my entire legal career which, as of last Saturday, is 20 years. They were insulting to me. And I don't take it personally because you're now an advocate as well as a party.

They were insulting to the lawyers involved. They were total fabrication and fantasy. And the motion is denied.

Do you want to add anything?

MR. SPITZER: I don't have much to add.

THE COURT: That's the end. The stay is denied. The motion is denied.

I don't want to ever see another paper from you personally.

MR. SACHS: May I speak, your Honor?

THE COURT: No. I read your papers. That's the whole purpose. If you want to apply to a lawyer, you may do it.

MR. SACHS: I was told the lawyer doesn't want to take the case, your Honor.

THE COURT: That's because there's no merit to it. Goodbye.

MR. SACHS: Goodbye.

THE COURT: That's the ruling on the law. There's nothing there. It's fantasy. It's denied. I want the Appellate Division clerk informed today there's no stay and the motion here was denied. He was seeking a stay of that decision also.

THE COURT: Bring him back in. I want him to surrender. I'm sorry. Get him back just for a date. That's pending the appeal.

Let's do it on the Fourth of July.

We'll give him a send off. We don't meet on the Fourth of July. We'll be meeting on the third of July that week.

Mr. Sachs, is the third of July a good day for you to come back?

MR. SACHS: The third of July, yes.

THE COURT: You're not going to be out out of

5

the jurisdiction, at the beach or anything? I'm serious.

MR. SACHS: No.

THE COURT: Third of July this case is on. We'll have a decision by the Appellate Division by that day, I'm sure. We're going to have a calendar on the third. We won't meet on the fourth.

* * *

The foregoing is certified to be a true and correct transcript of the original stenographic record.

_____

Joyce Fisher
Senior Court Reporter

APPENDIX B.

APPELLATE DIVISION OF THE STATE OF NEW YORK CERTIFICATE, DATED JULY 19, 1990, DENYING DEFENDANT'S APPLICATION TO APPEAL.

STATE OF NEW YORK

APPELLATE DIVISION : FIRST DEPARTMENT

BEFORE: HON. E. LEO MILONAS, Justice

M-2959 Indictment No. 4807/87

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

WILLIAM R. SACHS,

Defendant.

----------X

I, E. LEO MILONAS, a justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant (by notice of appeal) for a certificate pursuant to Section

460.15 of the Criminal Procedure Law, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County, entered on May 2, 1990, is hereby denied.

Dated: New York, New York
July 19, 1990

E. LEO MILONAS, Justice

APPENDIX C.

COURT OF APPEALS OF THE STATE OF NEW YORK CERTIFICATE, DATED FEBRUARY 1, 1991, DISMISSING DEFENDANT'S APPLICATION TO APPEAL.

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. VITO J. TITONE,
Associate Judge

In. No. 4807/87

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

WILLIAM SACHS,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, certify that the application by the defendant-appellant for a certificate to appeal pursuant to Section 460.20 of the Criminal Procedure Law is

dismissed because the order* sought to be appealed is not appealable under Criminal Procedure Law, § 450.90(1).

Dated at Staten Island, New York
February 1, 1991

s/VITO J. TITONE
Associate Judge

* Description of Order: Order of a Justice of the Appellate Division, First Department, dated July 19, 1990, denying permission to appeal to the Appellate Division from an order of Supreme Court, New York County, entered May 2, 1990.

APPENDIX D.

AMENDMENT XIV TO UNITED STATES CONSTITUTION.

Section 1, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E.

ORDER AND OPINION OF APPELLATE DIVISION, DATED JUNE 5, 1990, AFFIRMING JUDGMENT OF CONVICTION.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 5, 1990.

PRESENT: HON. Ernest H. Rosenberger, Justice Presiding
Bentley Kassal
Betty Weinberg Ellerin
George Bundy Smith
Israel Rubin, Justices.

40094

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

WILLIAM SACHS,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from

the judgment of the Supreme Court, New York County (Richard Andrias, J.), rendered on or about July 19, 1988, and said appeal having been argued by Richard P. Broder, of counsel for the appellant, and by Hildy B. Levine, of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The matter is remitted to Supreme Court, New York County for further proceedings pursuant to CPL 460.50(5).

ENTER:

FRANCIS X. GALDI
Clerk

Rosenberger, J.P., Kassal, Ellerin, Smith, Rubin, JJ.

40094

The People of the State of New York,

Respondent, H.B.Levine

-against-

William Sachs,

Defendant-Appellant. R.P.Broder

Judgment of the Supreme Court, New York County (Richard Andrias, J. at trial with a jury), rendered on or about July 19, 1988, convicting defendant of bribe receiving in the third degree, and sentencing him to a definite term of imprisonment of six months and a fine of $2,000, unanimously affirmed, and the matter remitted to Supreme Court for proceedings pursuant to CPL 460.50(5).

Defendant's claim that his guilt was not established beyond a reasonable doubt is without merit. In his brief submitted on this appeal, defendant admits that his actions were "inexcusably insensitive and unwise" but maintains that he acted in the capacity of "a private consultant selling his experience and knowledge, not as a bribe-seeking city [*sic*] employee." However, the transcript of a conversation between defendant and an undercover police officer, which was recorded using a miniature tape recorder concealed on the officer's person, reveals that defendant promised that certain building permits would be obtained in exchange for the payment to him of $5,000, with another $15,000 to be paid to an architect who would draw up any necessary plans. Defendant clearly represented that his position as

a Senior Plans Examiner with the New York City Buildings Department would be used to guarantee that the necessary permits would be forthcoming. At one point, the following exchange took place between defendant, designated "WS" in the transcript, and the undercover officer: "WS: I think that the way that you're approaching us is that you're making it easier for us and you're making it easier for yourself. UNDER: That's, that's, that's the name of the game. WS: And you're doing whatever you want, and you're gonna get . . . it's the sign-offs and the approvals." Towards the end of the conversation, on the question of payment, defendant stated, "Let me put it this way, for what I'm going to be involved in to get the whole thing moving and prepare the paper work, where ever [*sic*]

I can and to get all the drawings, all the records at the department into their hands and help the architect fill out all the papers and the notes and this and that. Uh, I would say five." The undercover officer paid defendant an advance of $1,000, of which defendant was still carrying $900 when arrested the following afternoon.

Defendant contends that certain questions addressed to the undercover officer by the prosecutor regarding the substance of the officer's conversation with defendant were improper and, taken together with other alleged errors, deprived him of a fair trial. The questions concerned the officer's understanding of the agreement reached with defendant which, defendant asserts, amounts to an invasion of the province of the jury to determine the ultimate

issue in the case. As his own brief points out, "the test of admissibility of such evidence is whether, given the nature of the subject, no better evidence is available" (citing, *People v. Cronin*, 60 NY2d 430, 432-433). It is defendant's contention that the tape recording itself is the best evidence of what transpired. What this argument disregards, however, are the numerous periods during which the transcript reflects that the tape is inaudible, at times during crucial points in the discussion. Clearly, the officer was an appropriate witness from whom to elicit a synopsis of the conversation to which he was a party, a conversation which is otherwise unavailable in its entirety. Moreover, defense counsel objected to the undercover officer's testimony on the ground that he was conveying an

expert opinion only once, upon redirect examination, and at that time the court clearly instructed the jury that the significance to be ascribed to any agreement between the undercover officer and defendant was ultimately a determination which was theirs alone to make.

Defendant also maintains that a reference to conflict of interest laws during the prosecutor's summation misled the jury as to the law applicable to the case. The court, however, immediately gave curative instructions that the crime charged was bribe receiving, directed that the reference to conflict of interest be disregarded, and correctly instructed the jury on the applicable law prior to their deliberations.

Defendant further argues that the court's instruction that no inference be drawn from his failure to testify went

beyond the bounds of the statute (CPL 300.10[2]). No objection was raised to the instruction during trial, however, and it is therefore unpreserved for appellate review (*People v. Autry*, 75 NY 2d 836).

Defendant's suggestion that the jury verdict was against the weight of the evidence (CPL 470.15[5]) is entirely without merit. When viewed in a light most favorable to the prosecution (*People v. Contes*, 60 NY2d 620) the evidence is legally sufficient to establish, beyond a reasonable doubt, that defendant accepted a bribe upon the understanding that his actions as a public servant would thereby be influenced (*People v. Charles*, 61 NY2d 321, 325-326).

Finally, we do not regard the sentence imposed as unduly harsh. Taking into account, "among other things, the

crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction," we perceive no abuse of discretion warranting a reduction in sentence (*People v. Farrar*, 32 NY2d 302, 305).

Order filed.

APPENDIX F.

DEFENDANT'S *PRO SE* MOTION TO VACATE JUDGMENT PURSUANT TO CPL 440.10, DATED APRIL 19, 1990.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK PART 63

Ind. No. 4807/87 CHARGE: BR 3.

----------X

PEOPLE OF THE STATE OF NEW YORK,

-vs-

WILLIAM R. SACHS,

Defendant.

----------X

Please take notice that upon the annexed duly verified affidavits of the defendant, Robert A. Sachs, and Margaret Gene Sachs, the defendant requests the court vacate such judgment upon the grounds that:

The judgment was procured by duress, misrepresentation or fraud on the part of

the court or a prosecutor or a person acting for or in behalf or a prosecutor; or

Material evidence adduced at the trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

Improper and prejudicial conduct not appearing in the record occurred during the trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

The judgment was obtained in violation of a right of the defendant under the constitution of New York State or of the United States.

APPENDIX G.

ORDER OF COURT OF APPEALS DENYING LEAVE TO APPEAL DATED JUNE 28, 1990.

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. VITO J. TITONE
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

WILLIAM SACHS,

Defendant-Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought

to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
June 28, 1990

s/VITO J. TITONE
Associate Judge

* Description of Order: Order of the Appellate Division, First Department, dated June 5, 1990, affirming a judgment of the Supreme Court, New York County, rendered on or about July 19, 1988.

APPENDIX H.

DEFENDANT'S MOTION AND AFFIRMATION SUBMITTED TO APPELLATE DIVISION DATED JUNE 28, 1990.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Ind. No. 4807/87

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

-v-

WILLIAM R. SACHS,

Defendant.

----------X

MOTION FOR CERTIFICATE GRANTING LEAVE TO APPEAL FROM DENIAL OF MOTION PURSUANT TO CPL SEC. 440.10.

SIRS:

PLEASE TAKE NOTICE, that on the annexed affirmation of Ronald L. Kuby, duly executed on the 28th day of June, 1990, and the exhibits thereto, the undersigned will move this Court, at a term thereof,

on July 9, 1990, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order, pursuant to N.Y.C.P.L. Sec. 460.15, granting defendant a certificate granting leave to appeal to the Appellate Division, First Department, from an Order denying defendant's motion to vacate his conviction, pursuant to N.Y.C.P.L. Sec. 440.10, and for such other and further relief as may be just and proper.

Respectfully submitted,

RONALD L. KUBY
WILLIAM M. KUNSTLER
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Dated: June 28, 1990
New York, NY

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Ind. No. 4807/87

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THE PEOPLE OF THE STATE OF NEW YORK,

-v-

WILLIAM R. SACHS,

Defendant.

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AFFIRMATION IN SUPPORT OF MOTION FOR CERTIFICATE GRANTING LEAVE TO APPEAL FROM DENIAL OF MOTION PURSUANT TO CPL SEC. 440.10.

Ronald L. Kuby, an attorney duly admitted to practice as such in the Courts of the State of New York, hereby affirms, under the pains and penalties of perjury, as follows:

1. I am the attorney for William R. Sachs, defendant herein, and I make this affirmation in support of his application for leave to appeal to the

Appellate Division, First Department.

2. On April 19, 1990, defendant, pro se, filed a motion, pursuant to CPL sec. 440.10, to vacate the judgment of conviction duly made and entered against him in New York County, Hon. Andrias, J., presiding, on July 19, 1988, sentencing him to a six month term of imprisonment and a fine of $2,000.00.

3. A copy of defendant's motion, with exhibits, is annexed hereto as Exhibit A.

4. The motion was denied from the bench on May 2, 1990. Exhibit B. Justice Andrias affixed a "So Ordered" to the transcript on June 27, 1990. Exhibit B at 5.

5. On May 2, 1990, the return date of the motion, the defendant, pro se, appeared before the Honorable Richard Andrias, J.S.C.

6. The trial court began by excoriating defendant for the slow progress of his direct appeal, despite the fact that defendant was representing by counsel and that appeal and such questions should have been directed to counsel. Exhibit B, Hearing Transcript, at 2.

7. Without waiting for the People's response to the motion, the court then launched into an angry attack on defendant, asserting:

> I've read the papers. They were the most offensive set of papers that I've ever seen in my legal career, which, as of last Saturday, is 20 years. They were insulting to me. And I don't take it personally because you're now an advocate as well as a party.
>
> They were totally insulting to the lawyers involved. They were total fabrication and fantasy. And the motion is denied.

Exhibit B, at 3.

8. The Court then went on:

> That's the end. The stay is denied. The motion is denied. I don't want to ever see another paper from you personally.
>
> * * *
>
> There's nothing there. It's fantasy. It's denied.

Exhibit B, at 3.

9. Finally, in selecting a date for the defendant to surrender for commencement of his sentence, the Court stated: "Let's do it on the Fourth of July. We'll give him a send-off ***." Exhibit B, at 4.

10. The Court's extraordinary diatribe violated not only the "appearance of justice" standard imposed upon juricial officers, but also the requirements of Section 440.10 itself. The Court did not cite, rely upon, or address any of the factors set forth in subsection (2)

or (3) permitting denial of the motion. Instead, the Court peremptorily dismissed defendant's factual allegations as "fantasy," and did so in a particularly abusive and hostile manner.

11. In his motion, defendant makes a number of serious allegations of misconduct that a section 440.10 motion lies to cure. Specifically, defendant alleged that after the chief prosecution witness deliberately made a false statement of fact, the trial judge conferred improperly with the prosecutor and the prosecution witness. In addition, defendant alleges that a number of other witnesses made false statements of material fact, and that his trial lawyer failed to take steps necessary to expose these falsehoods; that a portion of the tape that was introduced into evidence had been tampered with to remove a

section damaging to the prosecution; and that defense counsel failed to render effective assistance by refusing to present available, exculpatory witnesses, including the defendant himself.

12. All of these allegations, particularly the denial of defendant's right to testify in his own behalf, required more thorough treatment than the trial court's enraged denials and accusations.

13. In such a situation, where the integrity of the trial judge himself is being questioned, the motion should be referred to another judge for disposition. For the court to make itself both witness and adjudicator was manifestly improper. To do so in a moment of anger was even more egregious. And to do so in a manner that denies all defendant's claims, including those of

which the judge could have no personal knowledge, requires the intercession of this Court.

WHEREFORE, it is respectfully requested that this Court grant leave to appeal, or, in the alternative, summarily reverse the decision by the trial court and remand the cause to a different Supreme Court Justice.

Respectfully submitted,

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RONALD L. KUBY

Dated: New York, NY
June 28, 1990

APPENDIX I.

DEFENDANT'S APPLICATION TO THE COURT OF APPEALS DATED DECEMBER 7, 1990.

Honorable Sol Wachtler
Chief Judge
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

December 7, 1990

ATTENTION:
Clerk of the Court

Re: People of the State of New York
vs. William Sachs
New York County -
Ind. No. 4807/87
Application for leave to Appeal

Dear Judge Wachtler:

We write on behalf of our client, William Sachs, seeking leave to appeal to this Court from an order of a single justice, Honorable E. Leo Milonas, of the Appellate Division, First Department, denying leave to appeal to the appellate division, dated July 19, 1990 and mailed to Ronald L. Kuby, appellate counsel.

We have enclosed copies of the motion for certificate granting leave to appeal to the appellate division (hereinafter "cert. motion"), the answer, and the order of Justice Milonas denying leave to appeal.

This appeal arises from an order of Honorable Richard Andrias, Justice, New York State Supreme Court, New York County, dated May 2, 1990, denying a pro se motion pursuant to CPL 440.10 made on April 19, 1990 to vacate the judgment of conviction made and entered against William Sachs in New York County on July 19, 1988, sentencing Mr. Sachs to a term of six (6) months imprisonment and a fine of $2000.00.

We respectfully submit that this appeal raises relevant and significant legal issues for the Court to decide upon. Primarily in reviewing this case, the Court will have the opportunity to address the scope of its competence in hearing criminal appeals. The Court also will be able to further deliniate the legal standard for effective assistance of counsel as well as the standard for judicial conduct at trial and in hearing motions.

It is settled that this Court is a court of limited jurisdiction in all matters. Specially in criminal appeals, its competence is based upon statutory authority. People vs. Santos, 64 NY 2d 702, 704, 485 NYS 2d 524, 525 (Ct. App. 1984); In Re Ryan, 306 NY 11, 17, 114 N.E. 2d 183, 185 (Ct. App.); People vs. Zerillo, 200 NY 443, 446, 93 N.E. 1108, 1109.

The relevant Criminal Procedure Law section authorizing appeals, CPL 450.90, has been interpreted incorrectly by two (2) departments as not authorizing appeals to the Court of Appeals from orders of a single justice of the inter-

mediate appellate court denying leave to appeal to the intermediater appellate court. People vs. Williams, 342 NYS 2d 75, 76 (2d Dept. 1973); People vs. Brock, 332 NYS 2d 110 (1st Dept. 1972).

In applying the doctrine of statutory interpretation, one must first look at the plain and simple meaning of the language of the statute. The language of CPL 450.90 is clear on its face. The statute allows appeals to the Court of Appeals by either party "from any adverse or partially adverse order of an intermediate appellate court. CPL 450.90(1). The order should be entered on an appeal taken to that intermediate appellate court pursuant to CPL 450.10, 450.15, 450.20. The language of CPL 450.90(1) is limited by 450.90(2), which limits appeals to questions of law or to questions of illegal action by the intermediate appellate court.

We contend that the statute does authorize appeals to the Court of Appeals in situations as in the case at bar. Orders from a single justice of an intermediate appellate court denying leave to appeal to that intermediate appellate court are entered on an appeal because requesting permission to appeal is the first step in the appellate procedure. CPL 450.15. Such an order is certainly adverse to the party making the motion for permission to appeal. Said orders denying permission to appeal fall within the scope of CPL 450.90 and should not be dismissed for that reason.

Our contention is reasonable as its basis is the plain and simple meaning of the language of the statute. It is also consistant with the requirement that appeals to the Court of Appeals be within the Court's competence to hear. That grant of authority is found in CPL 450.90. Case law that is not consistant with our contention does not look to the plain and simple meaning of the statute and should be overruled.

As stated above, this case raises other significant issues that the Court may wish to address. Mr. Sachs' pro se CPL 440.10 motion properly and sufficiently alleges fraud and misrepresentation during trial, violations of federal and state constitutional rights, ineffective assistance of counsel, and questionable conduct by a trial judge. These allegations were pleaded in accord with the requirements of CPL 440.10, 440.30. They were sworn to and not conclusory. The motion cites specific instances of alleged violations and does not rest on blank accusatory statements. Even if it is argued that some of the allegations could have been raised on direct appeal, that argument would not effect the majority of allegations in the motion. (appendix A of cert. motion).

More specifically, there are allegations of an improper conference, off the record, between the trial judge, the prosecutor and the chief prosecution witness. (exhibit A of cert. motion, p. 24, I 8). The allegations of ineffective assistance of counsel include

the failure of trial counsel to call Mr. Sachs as a witness, trial counsel's failure to call available exculpatory witnesses on his client's behalf, as well as trial counsel's ineffective cross examination of witnesses, which failed to expose certain falsehoods. (exhibit A of cert. motion, pp 26-33, I I 9, 10). The proper place for these allegations is a CPL 440.10 motion and once raised, they should not be brushed aside as "fantasy" or "total fabrication."

In addition to the allegations against the trial judge stated in Mr. Sach's pro se motion, there is an issue in regard to his conduct on the return date of the motion, May 2, 1990, as set out in the transcript of the proceedings. (exhibit B of cert. motion).

At the beginning of the proceeding, Mr. Sachs, who is appear pro se, is badgered by questions about the so called delay in appeal. When the judge moves on the issue of the motion, he launches upon a critical exposition of the motion. The motion is denied and the papers are denounced as "fantasy" and "total fabrication." (exhibit B of cert. motion, p.3). There is no explanation nor citation of statute or case law on which the judge has relied in the transcript. No mention is made of CPL 440.10(2), 440.10(3), or 440.30, which state the reasons motions can be denied.

The transcript of the proceedings on the return date of the motion holds statements that are telling of the trial judge's attitude towards Mr. Sachs. The

judge remarks of giving Mr. Sachs a "send off" on the Fourth of July. (exhibit B of cert. motion p. 4). The remark and the judge's anger expressed throughout the transcript does not establish impartiality. It suggests that the judge may not have been suited to hear the motion and at the least should have recused himself.

In reviewing this appeal, this Court will have the opportunity to further delineate legal issues relevant to the practice of law in New York State. These issues include standards of ineffective counsel, standards of proper procedures in hearing CPL 440.10 motions, and the scope of this Court's competence in hearing criminal appeals. In addition, there is the interest of justice, by which this Court can reach down and salve the hurt to William Sachs, a man adrift in a legal sea, awaiting a safe harbor where his complaint will be heard and any wrong corrected.

We respectfully request oral argument on this application.

No prior application has been made to a Justice of the Appellate Division requesting leave to appeal.

Respectfully submitted,

Manmohan K. Bakshi

MKB:ng
Encls.